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No. 95-1708

In the Supreme Court of the United States

OCTOBER TERM, 1995

GREATER NEW ORLEANS BROADCASTING ASSOCIATION, INC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS

DREW S. DAYS, III
Solicitor General
FRANK W. HUNGER
Assistant Attorney General
ANTHONY J. STEINMEYER
SCOTT R. MCINTOSH
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217

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QUESTION PRESENTED

Whether 18 U.S.C. 1304, which prohibits the broadcasting of advertisements for "any lottery, gift enterprise, or similar scheme," violates the First Amendment as applied to broadcast advertisements for legal casino gambling.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 69 F.3d 1296. The opinion of the district court (Pet. App. 19a-31a) is reported at 866 F. Supp. 975.

JURISDICTION

The judgment of the court of appeals was entered on November 30, 1995. A petition for rehearing was denied on January 23, 1996. The petition for a writ of certiorari was filed on April 22, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 1304 of Title 18 prohibits television and radio stations licensed by the Federal Communications Commission (FCC) from broadcasting advertisements for "any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance."[1] Section 1304 is part of a long-standing body of federal restrictions on interstate commerce involving lotteries and related gambling activities. 18 U.S.C. 1301-1307; 39 U.S.C. 3001, 3005; see generally *United States* v. *Edge Broadcasting Co.*, 509 U.S. 418, 421-423 (1993) (discussing statutory history). Section 1304 was enacted in 1934 to complement existing restrictions on the distribution of lottery advertising and paraphernalia through the mails and other forms of interstate transportation. See 18 U.S.C. 1301 (interstate transportation), 1302 (mail); 39 U.S.C. 3001(a), 3005 (mail).

Section 1304 is a criminal statute. The government's practice, however, has not been to bring criminal prosecutions for violations of the statute. Instead, the advertising restriction has been enforced administratively by the FCC, which has adopted

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[1] Section 1304 provides in pertinent part:

> Whoever broadcasts by means of any radio or television station for which a license is required by any law of the United States, * * * any advertisement of or information concerning any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any list of the prizes drawn or awarded by means of any such lottery, gift enterprise, or scheme, whether said list contains any part or all of such prizes, shall be fined under this title or imprisoned not more than one year, or both.

a regulation subjecting broadcasters to the same restriction. See 47 C.F.R. 73.1211(a).[2]

By its terms, Section 1304 applies to broadcast advertisements for any "lottery, gift enterprise, or similar scheme." In *FCC* v. *American Broadcasting Co.*, 347 U.S. 284 (1954), this Court construed that language to encompass any undertaking involving "(1) the distribution of prizes; (2) according to chance; (3) for a consideration." *Id.* 290. That formulation encompasses most if not all kinds of gambling activities that take place in casinos, and Section 1304 has therefore been understood to apply to advertising for casino gambling as well as "lotteries" in the more traditional sense.[3]

In recent years, Congress has enacted several exceptions to Section 1304. In 1976, Congress adopted a partial exemption for state lotteries, allowing the broadcasting of advertisements for state lotteries in States that conduct such lotteries. 18 U.S.C. 1307(a)(1). In 1988, Congress adopted exemptions for broadcast advertisements for Indian gambling, charitable gambling, and government-conducted gambling

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[2] Section 73.1211(a) provides in pertinent part:

> No licensee of an AM, FM, or television broadcast station, except as in paragraph (c) of this section, shall broadcast any advertisement of or information concerning any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any list of the prizes drawn or awarded by means of any such lottery, gift enterprise or scheme, whether said list contains any part or all of such prizes.

[3] In the proceedings below, petitioners contended that Section 1304 does not apply to casino gambling. The district court and the court of appeals both rejected that statutory argument (Pet. App. 4a-5a, 23a-24a), and petitioners do not renew it here.

other than state lotteries. 18 U.S.C. 1307(a)(2)(A); 25 U.S.C. 2720.[4] The FCC has made corresponding changes in its regulation. See 47 C.F.R. 73.1211(c). However, Congress has specifically rejected proposals to allow broadcast advertising for legal casino gambling. See 134 Cong. Rec. 12,278-12,282 (1988) (House); *id.* at 31,073-31,076 (Senate).[5]

2. Petitioners are New Orleans, Louisiana, television and radio stations that desire to broadcast ads for Louisiana and Mississippi casino gambling. They commenced this action in February 1994, contending that Section 1304, as applied to broadcast advertising for casino gambling in States where casino gambling is legal, violates the First Amendment. Pet. 8.[6]

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[4] Congress has also adopted exceptions for advertising related to promotional activities (*e.g.*, an auto dealership's car raffle); certain fishing contests; and sporting events. See 18 U.S.C. 1305, 1307(a)(2)(B), 1307(d).

[5] As originally proposed, the Charity Games Advertising Clarification Act of 1988, Pub. L. No. 100-625, 102 Stat. 3205 (codified principally at 18 U.S.C. 1307), would have removed advertising restrictions on all lotteries allowed under state law, including commercial casino gambling. See 134 Cong. Rec. 12,278-12,280 (1988). The House of Representatives, however, adopted an amendment that specifically excluded casino gambling from the bill, over the objections of representatives from Nevada and New Jersey. *Id.* at 12,280-12,282. The Senate subsequently redrafted the bill to accomplish the same result. *Id.* at 31,073-31,076. In its report on the bill, the Senate Judiciary Committee emphasized that "no provision of [the bill] is intended to change current law as it applies to the interstate advertising of professional gambling activities." *Id.* at 31,075.

[6] Petitioners do not claim that Section 1304 interferes with news reporting or other non-commercial speech. Although Section 1304 refers to the broadcasting of "advertisement[s] of or information concerning" lotteries, the Federal Communications Commission and the courts have construed the reference

Petitioners' challenge was based on the First Amendment principles recognized in *Central Hudson Gas & Electric Corp.* v. *Public Service Comm'n*, 447 U.S. 557 (1980), and its progeny. *Central Hudson* subjects legislative restrictions on commercial speech to a four-part inquiry: (1) whether the speech concerns lawful activity and is not misleading, and (2) if so, whether the asserted governmental interest for the regulation is substantial; and if so, (3) whether the regulation "directly advances" the asserted interest and (4) whether it is no more extensive than is necessary to serve that interest. *Id.* at 566. In *Edge*, *supra*, this Court applied that four-part test to the federal regulation of state lottery advertising; the Court upheld the scheme's provisions whereby stations in States that conduct lotteries may broadcast lottery advertisements, while stations in non-lottery States may not. 509 U.S. at 426-435.

Petitioners and respondents filed cross-motions for summary judgment regarding the constitutionality of Section 1304. Relying on the principles articulated in *Edge*, *supra*, the district court entered summary judgment in favor of respondents. Pet. App. 19a-31a.

3. The court of appeals affirmed. Pet. App. 1a-18a. For purposes of review under *Central Hudson*, the government advanced two distinct interests that are served by Section 1304. The first is an interest in assisting States that have chosen to prohibit casino gambling and other "lotteries" covered by Section 1304. The second is an independent federal interest in

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to "information" not to apply to non-commercial speech such as news reporting. See *New York State Broadcasters Ass'n* v. *United States*, 414 F.2d 990, 993-994, 997 (2d Cir. 1969), cert. denied, 396 U.S. 1061 (1970).

discouraging public participation in gambling and thereby minimizing gambling's attendant social ills. The court held that both of those interests are "substantial" for purposes of the second prong of *Central Hudson*. Pet. App. 6a-10a.

The court further determined that Section 1304 directly advances those interests and is no more restrictive than necessary, thereby satisfying the third and fourth prongs of the *Central Hudson* test. Pet. App. 10a-13a. As to the third prong, the court explained that this Court's cases have expressly recognized that "the purpose and effect of advertising is to increase consumer demand," and it noted that "the vigor with which the statute has been challenged confirms the efficacy of the prohibition." *Id.* at 10a. Relying on *Edge*, the court rejected petitioners' claim that the ban does not directly advance the government's interest, because the government permits other forms of media to advertise casino gambling; as the court explained, quoting *Edge*, the government is not "require[d] * * * to make progress on every front before it can make progress on any front." *Id.* at 11a-12a.

As to the fourth prong of the *Central Hudson* test, the court noted that it is not a "least restrictive means" test, but one that requires "only that the regulation's restrictions reasonably fit the desired objective." Pet. App. 12a. Because Section 1304 is "equally tailored" to its objectives as the restrictions that this Court upheld in *Edge* and in *Posadas de Puerto Rico Associates* v. *Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986), the court found that Section 1304 satisfies the fourth *Central Hudson* prong. Pet. App. 12a-13a.

Chief Judge Politz dissented. Pet. App. 14a-18a. He believed that the statutory exceptions to Section 1304 prevent the statute from directly advancing the government's interests, and that the application of the statute to broadcast advertising in States that permit casino gambling is unduly restrictive. *Id.* at 14a-18a.[7]

ARGUMENT

1. On May 13, 1996, after the petition was filed, this Court struck down on First Amendment grounds two Rhode Island statutes that prohibited the advertising of retail liquor prices. See *44 Liquormart, Inc.* v. *Rhode Island*, 116 S. Ct. 1495 (1996). *44 Liquormart* produced four separate opinions, each of which found the Rhode Island statutes unconstitutional, but none of which commanded a majority of the Court regarding the appropriate First Amendment standards for government regulation of commercial speech.

Justice Stevens wrote the lead opinion, which was joined in full by Justices Kennedy and Ginsburg and in part by Justices Scalia, Souter, and Thomas. 116 S. Ct. at 1501-1515. Justice Stevens concluded that the Rhode Island statutes failed to satisfy the third and fourth prongs of the *Central Hudson* test. *Id.* at 1508-1510 (Part V) (joined by Kennedy, Souter & Ginsburg, JJ.). Justice Stevens, however, advocated the adoption of stricter constitutional standards than those of *Central Hudson* for laws, such as the Rhode Island statutes, that "entirely prohibit[] the dissemination of truthful, nonmisleading commercial

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[7] Another case raising the same First Amendment claim, brought by Nevada television stations, is currently pending before the court of appeals for the Ninth Circuit. *Valley Broadcasting Co.* v. *United States*, No. 93-16191 (argued Feb. 15, 1995).

messages for reasons unrelated to the preservation of a fair bargaining process." *Id.* at 1507-1508 (Part IV) (joined by Kennedy & Ginsburg, JJ.).

Justice O'Connor, joined by the Chief Justice and Justices Souter and Breyer, concurred in the judgment. 116 S. Ct. at 1520-1523. Justice O'Connor agreed with the lead opinion that the Rhode Island statutes failed to satisfy the fourth prong of *Central Hudson*. *Id.* at 1521-1522. Unlike the lead opinion, however, Justice O'Connor declined to depart from the *Central Hudson* test. *Ibid.*

Justice Scalia and Justice Thomas wrote separate opinions concurring in part and concurring in the judgment. Justice Scalia agreed that the Rhode Island statutes were unconstitutional under *Central Hudson*, but expressed the view that the scope of First Amendment protections for commercial speech should conform to the "long accepted practices of the American people." 116 S. Ct. at 1515. Justice Thomas called for a rule of *per se* unconstitutionality for advertising restrictions designed "to keep legal users of a product or service ignorant in order to manipulate their choices in the marketplace." *Id.* at 1515-1520.

2. In several respects, *44 Liquormart* casts new light on the First Amendment issues decided by the court of appeals. While none of the opinions in *44 Liquormart* commanded a majority of the Court regarding the general standards of First Amendment protection for commercial speech, the opinions do clarify the Court's prior commercial speech precedents in several respects. For example, the lead opinion of Justice Stevens and Justice O'Connor's concurring opinion both indicate that a blanket ban on commercial speech will ordinarily not survive scrutiny under the fourth prong of *Central Hudson* if

the interests advanced in support of the ban can be served equally well by alternative, non-speech-related means. See 116 S. Ct. at 1510 (Part V) (Stevens, J., joined by Kennedy, Souter & Ginsburg, JJ.); *id.* at 1521-1522 (O'Connor, J., joined by the Chief Justice and Souter & Breyer, JJ.). Similarly, the lead opinion and Justice O'Connor's concurrence both question the continued authority of *Posadas de Puerto Rico*, *supra*, regarding judicial deference to legislative choices between commercial speech restrictions and other means of reducing consumption of legal products. See *id.* at 1511 (Part VI) (Stevens, J., joined by Kennedy, Thomas & Ginsburg, JJ.); *id.* at 1522 (O'Connor, J., joined by the Chief Justice and Souter & Breyer, JJ.).

Because the court of appeals did not have the benefit of this Court's views in *44 Liquormart*, the Court should grant the petition, vacate the judgment of the court of appeals, and remand for further consideration, as it did in two recent cases raising commercial-speech issues. See *Hospitality Investments of Philadelphia, Inc.* v. *Pennsylvania State Police*, No. 94-1247 (May 20, 1996) (remanding for further consideration in light of *44 Liquormart*); *Anheuser-Busch, Inc.* v. *Schmoke*, No. 95-685 (May 20, 1996) (same). In suggesting that the Court remand this case, we do not mean to imply that the decision of the court of appeals is erroneous, or that *44 Liquormart* renders Section 1304 unconstitutional in any respect. *44 Liquormart* sheds additional light on the First Amendment issues in this case, however, and it is appropriate for the court of appeals in the first instance to reconsider those issues in light of the guidance that may be drawn from *44 Liquormart*.

CONCLUSION

The petition for writ of certiorari should be granted, the judgment of the court of appeals should be vacated, and the case should be remanded for further consideration in light of *44 Liquormart, Inc.* v. *Rhode Island*, 116 S. Ct. 1495 (1996).

Respectfully submitted.

DREW S. DAYS, III
Solicitor General
FRANK W. HUNGER
Assistant Attorney General
ANTHONY J. STEINMEYER
SCOTT R. MCINTOSH
Attorneys

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